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SIXTH REPORT ON STATE RESPONSIBILITY

by

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Addendum

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III. MAIN ISSUES TO BE CONSIDERED IN THE FORTHCOMING DEBATE ON THE CONSEQUENCES OF INTERNATIONALLY WRONGFUL ACTS CHARACTERIZED AS CRIMES UNDER ARTICLE 19 OF PART ONE OF THE DRAFT ARTICLES ON STATE RESPONSIBILITY

1. According to plans, the coming session of the Commission is to devote part of its time to a debate on the consequences of State crimes, as defined in article 19 of Part One of the draft articles on State responsibility: this on the basis of the Special Rapporteur's fifth report (A/CN.4/453/Add.2 and 3). Considering the great difficulty of the subject and the high number of issues raised in the said report, it was thought useful, together with Professor Derek Bowett, to list those issues in logical order with a view to favouring an orderly and fruitful debate. It would thus be easier, for the Special Rapporteur, to draw from the debate the necessary guidance for the following work on the subject.

2. The list, which is accompanied by references to the relevant paragraphs of the fifth report, is as follows:

A. Can the crimes be defined?

3. Article 19 of course contains a "definition". But paragraph 2 is somewhat "circular", referring to a breach which is recognized as a crime by the international community: the question remains, what crimes are so recognized?

4. Paragraph 3 of article 19 identifies four categories on the basis of the law in force, namely:

(a) A serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) A serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) A serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) A serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

5. In addition to doubts as to whether the very notion of international crimes of States should be retained at all (see A/CN.4/453/Add.3, paras. 142-159), the question is very likely to arise whether the above list ever was and currently is the most satisfactory (ibid., para. 161 (ii)). Although this question may

seem to pertain exclusively to article 19 of Part One, it would be difficult not to take some account of the issue at the present time in determining the consequences of the wrongful acts in question. The definition, therefore, should receive some attention as a preliminary point in the expected 1994 debate (ibid., paras. 160-161).

B. Assuming an agreed definition can be reached, who determines that a "crime" has been committed?

6. A clear distinction would seem to suggest itself between the two following categories (ibid., para. 161 (i)):

1. Crimes such as aggression

7. In the case of such crimes, the determination could be made by:

(a) The State victim of the aggression (see A/CN.4/453/Add.3, paras. 63 ff.), albeit on a provisional basis, as part of the State's decision to invoke the right of self-defence (ibid.);

(b) Other States assisting the victim pursuant to the right of collective self-defence (ibid.), here again on a provisional basis;

(c) The Security Council. In fact the Security Council has never, as yet, characterized a State as an "aggressor". If it did so, would this finding be definitive or only provisional in the sense that a definitive finding would be left to an international court? And in that case, which court? (see A/CN.4/453/Add.2, paras. 52 ff. and A/CN.4/453/Add.3, paras. 103-109).

2. Other crimes

8. In the case of other crimes, the determination could be made by:

(a) The victim State - an unlikely solution, violating the maxim nemo judex in sua causa;

(b) Other States - an equally unattractive solution, unless those States acted through some authoritative and internationally recognized body;

(c) The General Assembly, even though the Assembly, notwithstanding evidence that it claims such power in relation to crimes such as apartheid or colonialism, remains a highly political body and would lack power to make a binding finding (see A/CN.4/453/Add.3, paras. 100-101);

(d) The Security Council, even though the link with Chapter VII is far from clear, and this organ, too, is political (see A/CN.4/453/Add.2, paras. 52-56 and A/CN.4/453/Add.3, paras. 102 ff., esp. 110-115);

(e) An international court. However, no such court exists. The International Court of Justice is unsuitable because its jurisdiction rests on consent and such consent is unlikely to be forthcoming from a State accused of a crime (see A/CN.4/453/Add.3, paras. 106-109). The newly proposed court is designed to deal with individuals, not States.

C. What are the possible consequences of a finding of crime?

9. The possible consequences of a finding of crime might relate first to the specific type of remedies available and to the faculté of resort to countermeasures and, secondly, to the conditions under which all States, rather than the actual victim, might be allowed to seek remedies or to resort to countermeasures (see A/CN.4/453/Add.2, paras. 12 ff.).

1. Remedies available and faculté of resort to countermeasures

(a) Remedies available

10. In his fifth report, the Special Rapporteur indicated that as far as cessation was concerned, it did not seem that crimes presented any special character in comparison with "ordinary" wrongful acts (A/CN.4/453/Add.3, paras. 63-68). As regards reparation lato sensu (ibid., paras. 70 ff.), the Special Rapporteur has raised in relation to restitution in kind the question whether the limitations contained in article 7 (c) and (d) on disproportion in relation to compensation and on serious jeopardy to the State concerned should apply in the case of crimes (ibid., paras. 71-72). As regards compensation, he has asked whether the ban in paragraph 3 of article 10 on demands for satisfaction which would impair the dignity of the State concerned should apply in the case of crimes (ibid., para. 74).

11. Additionally, if crimes are to be treated as breaches erga omnes, are non-victim States entitled to these same remedies? (See A/CN.4/453/Add.2, paras. 14 and 28 and A/CN.4/453/Add.3, paras 76-78.) And, if so, is this entitlement dependent upon a decision of a competent United Nations organ, such as the Security Council, or can States demand these remedies on their own initiative?

(b) Faculté of resort to countermeasures

12. Several questions arise in this context:

(a) Can all States take countermeasures in the case of crimes, i.e., do all States become "injured States" for the purposes of article 11? (see A/CN.4/453/Add.3, paras. 118-132)

(b) Do the conditions of article 12 apply?

(c) Does proportionality apply as provided in article 13?

(d) Do the prohibitions of article 14 apply, or, for example, should extreme measures of political and economic coercion, or even the use of armed force be permitted,either with or without the prior authorization of the Security Council? (ibid., paras. 84, 90-105)

(e) Would departures from the normal conditions governing countermeasures be possible for all States, or only the actual victim of the crime?

2. Conditions under which all States, and not only the actual victim, might, in the case of a crime, be allowed to seek remedies or to resort to countermeasures

13. The question arises whether, in the case of a crime, any State should be allowed to seek remedies or to resort to countermeasures on its own authority or on authority from the Security Council or further to an authorization from a competent court.

14. In the first alternative, the right conferred on the State would presumably have to be subject to the exercise by the Security Council of its powers under Chapter VII and a State's obligations under Article 25 of the Charter.

15. In the second alternative, would the Security Council be competent outside the domain of crimes involving aggression or unlawful use of force?

16. The third alternative is a theoretical one since no court competent to deal with such matters currently exists.

3. Possible exclusion of crimes from the scope of application of the provisions on circumstances precluding wrongfulness

17. This question arises in the case of consent (article 29 of Part One), force majeure (article 31 of Part One), distress (article 32 of Part One) and state of necessity (article 33 of Part One). As regards self-defence (article 34 of Part One), it should be pointed out that the notion of crime and that of self-defence are incompatible.

4. The general obligation not to recognize the consequences of a crime (see A/CN.4/453/Add.3, paras. 133 ff.)

18. The obligation not to recognize as legal any territorial acquisition resulting from aggression is already accepted. There remains the question whether the obligation is activated by a prior, authoritative finding by an impartial organ of the world community that the crime of aggression has been committed: is the Security Council the only organ empowered to make such a

finding and is a specific call for non-recognition by the Security Council a prerequisite to the activation of the obligation?

5. The general obligation not to aid the "criminal" State and to render aid to the victim (ibid., paras. 136-141)

19. Here too, the question arises whether the obligation in question arises spontaneously or as a result of specific decisions under the Charter of the United Nations, notably Articles 2 (5), 24 and 25, Chapter VII and Article 102.

20. The above list should of course be no obstacle to debating any other relevant issues dealt with in the fifth report or otherwise considered important by members of the Commission.